



1-1-2003

Subversive Moments: Challenging the Traditions of Constitutional History

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13 Tex. J. Women & L. 91

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SUBVERSIVE MOMENTS: CHALLENGING THE TRADITIONS OF CONSTITUTIONAL HISTORY

Patricia A. Cain and Linda K. Kerber

I. Introduction.....	91
II. Background.....	92
III. Our Course.....	95
A. Cogger v. North West Union Packet Co.....	97
B. Coggeshall v. City of Des Moines.....	98
C. Green v. Shama	100
IV. What We've Learned.....	102
Appendix.....	104

I. Introduction

For the past five years we have been making our own subversive intervention into the law school curriculum. Courses in “Gender and the Law” are now common. Our course, “Gender and Constitutional History,” is a variation that we have found invigorating to teach jointly: one of us is trained as a lawyer, the other as a historian. Roughly half of our students are law students; the others are humanities and social science graduate students; a few are advanced undergraduates. We promise to teach the law students to think like historians and the non-law students to begin to think like lawyers. More importantly, we seek to restore historical context to legal analysis.

When we began teaching this course, we did not appreciate how extensively we would challenge the assumptions that the law students brought to the classroom. The non-law students already knew they did not think like lawyers and were looking forward to this taste of a new discipline. But the law students had been well taught how to exclude “extraneous” data from the analysis of principles, many of the law students found restoring historical chronology and context challenging and invigorating. We also gained our own fresh perspectives. When assigning papers in which students reconstructed the history of litigation on equal treatment in the state of Iowa, we found, to our delighted surprise, that our students could make significant contributions to our understanding of women’s history, the history of the state, and indeed, the history of the

nation. (Our understanding of *Plessy v. Ferguson*¹ shifts when we take note of Emma Coger, who won her lawsuit against a steamboat company that refused to let her in to the first class dining room. The history of suffrage looks different when we know that in 1904 the women of Des Moines won a lawsuit defending their right to vote on bond issues that threatened to raise their taxes. Who knew that teachers in Cedar Rapids had sued the school district to retain their positions after maternity leave? Who knew that thirty years ago it was illegal in Iowa for a hairdresser with a cosmetologist's license to cut the hair of a man, but it was legal for a hairdresser with a barber's license to cut the hair of a woman?) Our students taught us quite as much as we taught them.

II. Background

The first "Women and the Law" courses were developed in the early 1970s.² These early courses were offered mainly in response to the demands of what was becoming a critical mass of women law students.³ Often the course was only nominally taught by a supportive law professor willing to lend her name to the course, and was instead essentially taught by students from materials that they had developed.⁴ By 1985, these courses were so numerous that Ann Shalleck of American University hosted a small but national conference of women law professors who shared syllabi and materials for Women and the Law courses.⁵ Conversations at that early meeting focused on whether women and the law courses were merely a temporary "fix" for the problem of omission, or whether it was a worthy endeavor on its own account. At that early meeting, participants concluded that studying issues about women across

1. 163 U.S. 537 (1896).

2. Linda K. Kerber, *Writing Our Own Rare Books*, 14 YALE J.L. & FEMINISM 429, 431 (2002).

3. In 1970, only 8.6% of law students were women; by 1980 the percentage of women had increased to 34.2%. See Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U.L. REV. 829, 849 (1995).

4. Yale students taught the course themselves in 1970 and then prevailed upon the administration to hire Barbara Babcock to teach it the next year. Kerber, *supra* note 2, at 431. The first "Women and the Law" course at Wisconsin was taught by Jean Love in 1972, then by a visiting professor, from materials put together by women law students. One year later, the University of Indiana inaugurated its first "Women and the Law" course, taught by Jack Getman, from materials prepared by his then-student, Martha West, who is now a law professor at the University of California, Davis.

5. Earlier national meetings to discuss women and the law issues occurred in 1971 at Yale, sponsored by the Carnegie Foundation, and in 1972 at NYU, sponsored by the American Association of Law Schools (AALS). See Kerber, *supra* note 2, at 429; Grace Ganz Blumberg, *Women and the Law: Taking Stock After 25 Years*, 6 UCLA WOMEN'S L.J. 279, 281 (1996).

the curriculum in a single course was an important consciousness-raising endeavor; professors and students were gaining important insights as they linked together issues that had been scattered.

These courses drew from the fields of family law, constitutional law, employment law, and criminal law. Much of what they taught—e.g. the inability of women to name their own children⁶—was either not covered in the standard substantive courses or was scattered in the standard curriculum and often taught from an outsider perspective, creating different implications.

These first courses were taught in an exciting political context fueled by grassroots feminist movements. In the early 1970s, the National Conference on Women and the Law began hosting annual conferences that focused on cutting-edge legal issues that affected women as a class.⁷ After Grace Blumberg published her path-breaking article on sexism in the Tax Code in 1972,⁸ the National Conference on Women and the Law began including sessions on federal tax law and on wills and trusts.⁹ The U.S. Supreme Court had just begun to recognize women as a protected class under the Equal Protection Clause of the Fourteenth Amendment,¹⁰ the Equal Rights Amendment had been introduced, and national activists were mobilizing for its ratification.¹¹ Finally, important doctrine was being created as the early Title VII cases involving sex discrimination were just beginning to be decided.

“Women and the Law” courses of the sort taught in the 1970s continue today. Sometimes called “Gender and the Law” or “Sex and the Law,” these courses tend to focus on the “woman issue” in various

6. See generally Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQ. 91 (1985).

7. For a brief history of this important early feminist organization, see Patricia A. Cain, *The Future of Feminist Legal Theory*, 11 WIS. WOMEN'S L.J. 367, 378-83 (1997).

8. Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971).

9. See *Women and the Law: A Sourcebook* (Eighth National Conference, Madison, Wisconsin) Mar. 24-27, 1977; *Women and the Law: A Sourcebook* (Ninth National Conference, Atlanta, Georgia) Apr. 6-9, 1978.

10. See *Reed v. Reed*, 404 U.S. 71 (1971).

11. The House passed the Equal Rights Amendment in 1971 and the Senate passed it on March 22, 1972. The Congressional resolution provided for a seven-year time period for ratification by the states. On Oct. 6, 1978, Congress added three years to the ratification period. The requisite number of states was 38. The amendment was never fully ratified. Regarding the constitutionality of the extension of the time period, see Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919 (1979). For a succinct and subtle history of the struggle, see DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 134 (1996), chapter 17. For an extended account of the ratification campaigns in a single state, see DONALD G. MATHEWS & JANE SHERRON DE HART, *SEX, GENDER, AND THE POLITICS OF ERA: A STATE AND THE NATION* (1990).

substantive legal disciplines. The disciplines covered may vary from course to course, but typically there is a heavy dose of family law, employment law, criminal law, and reproductive rights. This emphasis is reflected in the two major casebooks in this field.¹²

By the early 1980s, a new form of “Women and the Law” course began to appear in law schools around the country. These courses, often called “Feminist Jurisprudence” or “Feminist Legal Theory,” focused more on theory and less on substantive law. In 1983 the National Conference on Women and the Law for the first time included a panel that explicitly contained the phrase “feminist jurisprudence.”¹³ Today there are a wide range of casebooks from which one can choose when teaching a feminist jurisprudence course,¹⁴ and Martha Chamallas has just published the second edition of a “hornbook” on feminist legal theory.¹⁵

An informal survey of the course descriptions of seventy-five “Women and the Law” courses now taught throughout the U.S. reveals that they are about evenly divided between those that focus on theory and those that are similar to the thematic early courses. (Of course much depends on how the professor approaches and interprets the material.) But only eight of the course descriptions made any reference to the historical context in which the law has developed. In the casebooks that most students encounter, women’s relationship to the law—whether constitutional, familial, criminal, etc—is generally treated as a matter of discrimination based on gender. The intellectual challenge lies in identifying the appropriate level of judicial scrutiny in matters of equal protection. The key historic cases—*Bradwell*,¹⁶ *Muller*,¹⁷ *Goesaert*,¹⁸ and *Hoyt*¹⁹—appear as background as we move into the concept of suspect classification in equal protection law. These cases do not come up at their own chronological moment, though they stretch across a century from *Bradwell*

12. HERMA HILL KAY & MARTHA WEST, SEX-BASED DISCRIMINATION (5th ed. 2002) (family law: 219 pages; employment law: 419 pages; criminal law: 135 pages; reproductive rights: 101 pages); BARBARA BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW (2nd ed. 1996) (family law: 203 pages; employment law: 508 pages; criminal law: 189 pages; reproductive rights: 233 pages). Catharine A. MacKinnon’s more recently published casebook, SEX EQUALITY, also covers these areas but adds material on international issues and interdisciplinary approaches for a more complete coverage of both law and theory. Over 1600 pages in all.

13. See Cain, *supra* note 7; panels in earlier years included perspectives that could fairly be called “feminist jurisprudence” but did not use the term.

14. In addition to those cited in note 12, see KATHARINE T. BARTLETT & ANGELA HARRIS, GENDER AND THE LAW: THEORY, DOCTRINE COMMENTARY (2d ed. 1998); MARY BECKER ET. AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY (2d ed. 2001).

15. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (2d ed. 2003).

16. *Bradwell v. Illinois*, 83 U.S. 130 (1872).

17. *Muller v. Oregon*, 208 U.S. 412 (1908).

18. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

19. *Hoyt v. Florida*, 368 U.S. 57 (1961).

in 1872, to *Hoyt* in 1961, and to *Frontiero*²⁰ in 1973.

Our course—not surprisingly, since it is co-taught by a professor of law and a professor of history—is steeped in historical context. We think the inclusion of a heavy dose of history is subversive. It gives our students, most of whom were born well after the second wave of feminism had reached its peak and grassroots activism had receded from the levels of the early 1970s, important insights into the continuing power of patriarchy in the law. When we wonder why so many otherwise liberal students refuse to define themselves as feminists, one answer may be that the instruction that has been central to their understanding of American law and justice erases the ways in which the antique practices of coverture and the belief that different treatment on the basis of sex is not arbitrary but based on distinctions that nature itself has established, has infected understandings of equity from the era of the founding to the present.

We have had such a fine time teaching together that we'd like to encourage others to consider similar approaches. Interdisciplinary feminist pedagogy provides opportunities to address many important contemporary themes: the limits of liberal feminism, the relationship between Queer theory and liberal theory, the relationship between social movements for gay rights and social movements for women's rights, and the gendered and racialized dimensions of citizenship.

III. Our Course

Two major themes occur and recur in our syllabus:²¹ property relations and the impact of social movements. First, we ground women's experience in the old law of domestic relations, the law of Baron and Femme, Parent and Child, Master and Servant, and Master and Slave, that the founding generation brought intact into the new republic.²² The practices of coverture limited the control that women had over property and, by extension, constrained their ability to act as free agents, shaping relations between women and men from the beginning of the republic deep into the twentieth century. Though the rules of coverture seem simple and straightforward, the practices were complex and not always what the rule would predict.²³ When racial difference was involved, applying the rules

20. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

21. A copy of our current syllabus (material portions) is appended to this essay.

22. A good place to start is Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT'L LAB. & WORKING-CLASS HIST. 56 (1995).

23. See, e.g., *Lanier v. Ross*, 21 N.C. 39 (1834) in which a married woman with the help of a friend and the consent of her insolvent husband bargained with a seller to purchase property that would be placed in trust for her benefit. North Carolina recognized the general legal rule that a married woman could not own property, but also recognized the equitable exception that allowed her to own an equitable interest in trust. The North Carolina

could become explosive.²⁴ Much of our course, especially the first third, is devoted to showing the cleverness and originality displayed by people who lived in a system in which coverture controlled. As late as the 1960s, the rules of coverture were still entangling estates and affecting married women's right to contract.²⁵

Second, we seek to restore social context to legal and philosophical analysis. For example, constitutional law casebooks typically handle *Reed v. Reed*²⁶ and its successors by asking whether the Supreme Court's decision was based simply on "rational review" or whether it was in fact applying "heightened scrutiny." Reading these casebooks, however, one wouldn't have a clue that shortly before *Reed* was argued, 50,000 women had turned out for a parade in New York City—and more in other cities—on the fiftieth anniversary of equal suffrage; or that while *Reed* was being litigated, Senator Sam Ervin was mounting a strong campaign against the ERA and, once it was passed, would offer the services of his office, including his franking privilege, to Phyllis Schlafly and other ERA opponents.²⁷ In short, there is rarely anything in the discussions of specific cases that sets them in the context of the stunningly expansive women's movement, which, along with the civil rights movement, was the largest social movement of the twentieth century, and which defined the ERA as part of its agenda and lobbied with great intelligence for it.

The energy of women's liberation—and of civil rights and gay liberation—cannot be understood without recognizing that deeply embedded in American law and practice are unequal relationships that assume heterosexuality as a norm and challenge the revolutionary

Supreme Court held that the equitable exception applied only when the married woman was the passive donee or devisee of the equitable interest and could not apply when she was bargaining for the interest on her own behalf.

Even after states adopted married women's property acts, the rules of coverture continued. For example, a statute might grant a married woman the right to purchase property as her own separate property so long as she used her own funds for the purchase. But if she used her own earnings for the purchase, the transaction would not be covered by the new acts because the common law considered her husband the owner of her earnings. Thus, she would be acquiring the property not with her own funds but with the funds of her husband. See, e.g., *McElfresh v. Kirkendall*, 36 Iowa 224 (1873); *H. Apple & Co. v. Ganong*, 47 Miss. 189 (1872).

24. See *Stephens v. Clements*, 6 Binn. 206 (Pa. 1814) (recognizing the right of a black woman to contract and thereby validating her agreement to be an indentured servant).

25. See, e.g., *United States v. Yazell*, 382 U.S. 341 (1966) (questioning whether, under Texas law, a loan agreement between the Small Business Administration and a husband and wife could be enforced against the separate property of the wife; both the trial and appellate court ruled in favor of the wife on the basis of the Texas law of coverture; the Supreme Court affirmed, holding that there was no sufficient federal interest to trump state property law).

26. 404 U.S. 71 (1971).

27. See MATHEWS & DE HART, *supra* note 11.

principles of equality, liberty, and justice. *Reed*, *Frontiero*, and all the rest of the decisions down to *Romer*,²⁸ *Bowers*,²⁹ *Morrison*,³⁰ and the 2003 decisions in *Hibbs*,³¹ *Bollinger*,³² and *Lawrence*,³³ cannot be fully understood until we make room for the social movements that energized the litigators and gave them the language, the energy, and the sense of entitlement that enabled them to challenge the established ways of doing things.³⁴

Our students learn to appreciate this context partly by our lectures and the reading we assign, which includes the work of historians as well as legal scholars. Even more important, however, is their own research. We start them off by offering a list of selected Iowa appellate cases that involve issues of gender. We choose Iowa cases so that the students have a good chance of finding briefs and court papers, coverage in local newspapers, and for more recent cases, the ability to interview some of the litigants. We use appellate cases because the files are more likely to have been archived. The cases we list are ones that we think the students will find interesting, but once they have done the research, we are almost always happily surprised by how much they have found and how significant these underexamined cases often are. Three of our favorite cases are: (1) *Coger v. North West Union Packet Co.*,³⁵ (2) *Coggeshall v. City of Des Moines*,³⁶ and (3) *Green v. Shama*.³⁷

A. *Coger v. North West Union Packet Co.*³⁸

Emma Coger was a young schoolteacher in Illinois, African-American and light-skinned. It does not appear that she lived her life championing the cause of her race. But in the 1870s she staged what is unquestionably one of the earliest “sit-ins” (or perhaps, more accurately, a “sit-down”) to assert her right to equal treatment. She boarded the steamer, S.S. Merrill,

28. *Romer v. Evans*, 517 U.S. 620 (1996). For the complete story about this case and the movements that were engaged in it, see LISA KEEN & SUZANNE B. GOLDBERG, *STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL* (1998).

29. *Bowers v. Hardwick*, 478 U.S. 186 (1986). For more about this case, see PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT*, 169-82 (2000).

30. *U.S. v. Morrison*, 529 U.S. 598 (2000).

31. *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

32. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

33. *Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

34. For discussions about the role of social movements in litigation, see generally CAIN, *supra* note 29 and JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994).

35. 37 Iowa 145 (1873).

36. 117 N.W. 309 (Iowa 1908).

37. 217 N.W.2d 547 (Iowa 1974).

38. 37 Iowa 145 (1873).

in Burlington, Iowa, intending to travel down the Mississippi to Quincy, Illinois. She had difficulty purchasing a first-class meal ticket as the company's policy was not to afford such service to colored people. When she asked a chambermaid on the steamer to purchase such a ticket for her, the ticket came back with "colored girl" written on it. She returned that ticket and asked a white gentleman to purchase a ticket for her. Using the new ticket, she went into the dining cabin and seated herself at the "ladies table." Shortly thereafter, the captain arrived and asked her to remove herself. At this point a scuffle ensued. As the Iowa Supreme Court described it:

The request was for her to leave the table and take her meal on the guards or in the pantry, not to leave the reserved seat and take another. She refused, and thereupon the captain of the boat was sent for, who repeated the request, and, being denied compliance, he proceeded by force to remove her from the table and the cabin of the boat. She resisted so that considerable violence was necessary to drag her out of the cabin, and, in the struggle, the covering of the table was torn off and dishes broken, and the officer received a slight injury. The defendant's witnesses testify that she used abusive, threatening and coarse language during and after the struggle, but this she denies. Certain it is, however, that by her spirited resistance and her defiant words, as well as by her pertinacity in demanding the recognition of her rights and in vindicating them, she has exhibited evidence of the Anglo-Saxon blood that flows in her veins. While we may consider that the evidence, as to her words and conduct, does not tend to establish that female delicacy and timidity so much praised, yet it does show an energy and firmness in defense of her rights not altogether unworthy of admiration. But neither womanly delicacy nor unwomanly courage has any thing to do with her legal rights and the remedies for their deprivation. These are to be settled without regard to such personal traits of character.³⁹

Recognizing Emma Coger's right to equal access to public accommodations, the Supreme Court of Iowa upheld the jury verdict of \$250 in her favor, as compensation for the assault and battery she suffered.

*B. Coggeshall v. City of Des Moines*⁴⁰

Toward the end of the nineteenth century, despairing from the failure to achieve full voting rights, Iowa suffragists joined their colleagues across the nation in attempting to find a partial solution. Narrowing their claims to the traditional American principle of "no taxation without

39. *Coger*, 37 Iowa at *1.

40. 117 N.W. 309 (Iowa 1908).

representation,” in 1894 they persuaded the legislature to permit women to vote in “any city, town or school election, on the question of issuing any bonds for municipal or school purposes, and for the purpose of borrowing money, or on the question of increasing the tax levy . . .”⁴¹ And in 1898, Des Moines women, placing their ballots in a separate box at polling places, voted on the question of purchasing a new water works for the city.

In 1907, another special election was called; one question was “Shall the city of Des Moines erect a city hall at a cost, not exceeding \$350,000?”⁴² By not specifying levying taxes or issuing bonds, the proponents believed they could exclude women from the polls, and city officials made no effort to prepare for their votes. When activist women attempted to vote they were turned away. Within a month, a group of plaintiffs, led by Mary J. Coggeshall and attorney Grace Ballantyne, challenged their exclusion from the polls. When they lost in District Court they appealed to the Iowa Supreme Court: “[w]hen the law of the land admits certain persons to even an insignificant place among the ranks of [electors], then . . . the free exercise of that granted right must be as fully protected by the courts as the political rights of those who first appropriated the power to make and limit the grant.”⁴³

The women found a sympathetic listener in Chief Justice Scott M. Ladd, who observed, “The right of suffrage is a political right of the highest dignity.”⁴⁴ While the Constitution of the State of Iowa granted the right to vote to “[e]very male citizen of the United States of the age of 21 years,”⁴⁵ who had lived in the state for the previous six months and in the county for sixty days, Ladd denied that the state constitution inhibited the expansion of suffrage to women—which, indeed, the legislature had done. He concluded that the “plaintiffs were entitled to vote on the question submitted at a special election June 20, 1907, and were illegally deprived of that privilege.”⁴⁶ He acknowledged that when an individual was disqualified from voting because of an error in judgment by a voting official, “there is no remedy” and the election remains valid. But in 1907, the voting officials had excluded “an entire class of voters . . . numerous enough to have changed the result. The denial is then in the nature of oppression and operates to defeat the very purpose of the election . . .”⁴⁷

41. 1894 Iowa Acts ch. 39.

42. *Id.* at 309.

43. *Abstract and Arguments in the Supreme Court of Iowa*, May Term, 1908. Appellants Brief and Argument, 560-61. We are indebted to Eleanor H. McConnell, *Fighting City Hall: The Battle for Municipal Suffrage in Progressive Era Des Moines*, (2001) (unpublished paper on file with authors).

44. *Coggeshall*, 117 N.W. at 312.

45. *Id.* at 311.

46. *Id.* at 313.

47. *Id.* at 314.

Ladd concluded impatiently: "According to the last state census, there were 19,179 native-born women above 21 years of age residing in Des Moines, or 741 more than there were men of like age." He refused to split hairs over the question of whether the outcome of the election would have shifted had women been able to vote; it was obvious that there were "more qualified female voters than were necessary to overcome the majority."⁴⁸ Coggeshall, Ballantyne, and their colleagues—determined citizens fighting corruption, despite their marginality—had persuaded the Iowa Supreme Court to declare the election invalid.

C. *Green v. Shama*⁴⁹

By the early 1970s, long shaggy hair had spread from young men to the middle-aged, from drop-outs to the middle class. Scorning traditional barbers and the close-cut hair styles barbers had been trained to cut, increasing numbers of men gravitated to cosmetologists, hairdressers accustomed to styling women's long hair. The Sioux City Journal even ran an advertisement placed by a beauty salon that was aimed at men: "Shag it!"

But when men turned up in women's beauty parlors, the parlors were breaking the law. Iowa statutes had long provided that barbers (virtually all men) could cut the hair of men or women, but cosmetologists (mostly women, but also a few men) could legally cut only the hair of women and of boys under the age of eleven. So when Rose Shama and Gary McCormack advertised that their salon understood the challenges of longer hair and welcomed men, Charles Green and other licensed barbers saw their livelihood at stake. The barbers argued that Shama and McCormack were maintaining "an unlicensed barber shop" and were engaging in false advertising since cosmetologists could not solicit adult men for haircuts. Both sides agreed that every citizen had the right to pursue any legitimate trade or occupation; and both sides agreed that the state could exercise its police power to pass laws to benefit the health and general welfare. But were the Iowa statutes reasonably related to the public health and safety? Or were the statutes "arbitrary, capricious and unreasonable," because they were intended to "limit competition under the guise of protecting the health and safety of the male public?"

In fact, the Iowa legislature was at that moment debating the same point. But the legislature was slowed down by the resistance of the organized barbers, and the Iowa Supreme Court would need to make a decision well before the legislature settled the matter.

In a series of arguments that are hard to credit now—it was, after all,

48. *Id.*

49. 217 N.W.2d 547 (Iowa 1974).

1974, only thirty years ago—the barbers asserted that the challenges they faced called for more skill and sophistication than cosmetologists were trained for. As the Court summarized it:

From the record we learn that differing approaches have been taken to men's and women's hair styling because of physiological differences between the sexes. Females have finer features due to the bony structure of the face and to the presence of a layer of fatty tissue which covers their bodies but not a male's. The female hairline differs due to the absence of sideburns and facial hair . . . Men suffer from baldness far more than women.⁵⁰

Adult male features change more than a female's because of facial hair, sideburns and exposure to the elements at work. Changes in a female's hair occur during menstrual and pregnancy periods. Health hazards are generally of greater incidence in cutting men's hair because they often come to a barber from performing manual labor and thus there are higher probabilities of spreading contagious diseases; the same hazards are not generally present in regard to women.⁵¹

The barbers had trouble discriminating between cultural style and biological situation:

Because of these differences, hair styling between the sexes differs. As a general rule, male hair has been cut short and, even if cut long, has a square, box-like appearance designed to look masculine.⁵²

Despite two dissenting votes—"Plaintiffs' assertions are untenable" observed Justice McCormick—the barbers won. The arguments were framed in terms of Equal Protection and the right to practice a calling, but, as the dissenting Justice concluded, what was actually at work was competition for clients; it was the statutes that were unconstitutional, not the practices. "This case would not have arisen had not a substantial number of men come to prefer what cosmetologists do with hair to what barbers do with hair." And for another year or so, in towns and cities across the state of Iowa, otherwise respectable, law-abiding men turned up quietly, after hours, without formal appointments, in unisex salons that dared not speak their names.⁵³

50. *Id.* at 549-50.

51. *Id.* at 550.

52. *Id.*

53. We are indebted to the research of Emily Coleman and Eriko Ugihara.

IV. What We've Learned

We have taught each other at least as much as we've taught our students; teaching together has been a selfishly enriching experience for both of us. Our students see that we are learning from each other, and that makes it easier for them to learn from each other and to learn from us. We hope the law students will emerge from class with a greater appreciation of the role of chance and serendipity in defining the challenges that lawyers face. We hope they emerge with an understanding that all knowledge is not included in Westlaw. (We figured out a long time ago that the grade on the research paper has only a little bit to do with brain power and mostly to do with how early in the semester they leave their computers and go into the library and mess around with old newspapers and manuscripts.) We hope the non-law students will learn to respect the contours of legal argument and the skills involved in cutting away the brambles of serendipity to reveal the underlying issues. We ask all our students to suspend their disbelief and try to imagine themselves in a time when coverture was the common sense of the matter, when slavery was a given, and when reasonable people had to wrestle with assumptions about the normative state of affairs that is very foreign to us now. We hope that we can ground 1973 in its own historical context for this generation of students who think it ancient history; 1773 (the Boston Tea Party), 1872 (*Bradwell*), 1973 (*Frontiero*), 2003 (*Lawrence*) all come in necessary chronological order.

In conclusion, Pat would say that she now finds it difficult to think of anything outside of chronological order, and this approach has infused her other courses. When she teaches her usual courses in trusts and estates and in tax, she includes much more about coverture and women's property. Linda would proudly say that she has learned to prompt students to "brief" a case technically—run a soft "paper chase" classroom, as it were. In her history department courses, Linda now grades exams anonymously (students get random numbers). And she has come to take pride in the fact that knowing some history can make a valuable contribution to lawyers' understanding of the issues that they face. We are not the only pair of lawyer/historian teaching together; last year Carol Sanger and Alice Kessler-Harris developed a course that focuses on family law in historical context at Columbia.⁵⁴

Our project retrieves many hidden aspects of women's complex history. Its goals, like those of any feminist project, are to uncover the hidden sites of power and to discern where power can be challenged. It is empowering to know that in 1908, well before women could vote in

54. The course was taught in the Spring semester of 2003 at Columbia and was called: Meanings of Motherhood: Historical and Legal Perspectives.

general elections, the women of Des Moines took on the power structure of the largest city in their state and won. It is empowering to know that long before *Plessy*, Emma Coger, a lone African-American woman, challenged a steamship company and won. Of course, most of the time the plaintiffs in our cases lose, but in questioning why they lost our students get angry, emerging not only with a lot of new information, but also with the commitment to direct their future work and research so as to disrupt inherited knowledge. We hope others will develop more versions of this subversive strategy.

Appendix

University of Iowa
School of Law
Fall, 2003

Gender and the Law: Constitutional History

Professor Patricia A. Cain

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Professor Linda K. Kerber

linda-kerber@uiowa.edu

PURPOSE OF COURSE:

This course is an effort to merge the approaches of historians and lawyers as we examine major themes in the history of gender and the law, especially constitutional law. The Federal Constitution of 1787 made no distinctions of gender and rarely used the generic *he*. The term “male” was not introduced into the Constitution until after the Civil War, and then only in the enforcement clause of the Fourteenth Amendment (a clause that has never been acted upon). Yet the relationship of men and women to the protections of the Constitution has differed; the ability of men and women to make claims of the state has varied; and the meaning of equal protection of the laws, guaranteed by the Fourteenth Amendment, has been experienced differently for men and for women.

The field of legal history has grown rapidly in recent years, greatly enriched by the work of scholars who address legal questions in deep historical context. We are hoping that those who enter the class having been trained as historians will emerge with some sense of what it means to think like a lawyer; that is, with an emphasis on principles of justice, rules of procedure, and the craft of argument. We hope that those who enter the class as law students will emerge with a greater appreciation for the role of social and historical context, and also the role of serendipity in shaping the legal challenges that courts and lawyers face.

Our course will be conducted in a lecture/discussion format. **Plan to read in advance of each day’s assignment so that our class can be an interactive one.** Required readings are drawn from many different genres: legal documents like court decisions, briefs and legislation; analytical chapters and essays by historians and lawyers. These different genres suggest different analytical strategies.

Research paper. Each student will submit a 10 page paper by Friday, December 5. The paper will place a single case in social and historical context. It will count 50% of your final grade.

The written paper will be the separate effort of individual students. But students will work collaboratively on the research. Groups will present their work to the class in November (see syllabus). We have prepared a list of Iowa cases that deal with significant matters of gender and the law. You will have the opportunity to rank your top choices and we will try, *but cannot promise*, to assign you to a group based on one of your selections. Be prepared to turn in a case selection card by September 17.

We have scheduled visits to the Law Library and to the Main Library that will introduce you to research strategies and library resources for this project.

Paper presentations. Students will present their contextualized case in teams toward the end of the semester.

Final exam. The final examination will include questions that ask you to display both historical and legal analysis. It will be a three-hour open-book exam on Tuesday, December 16 at 8:30 AM in the law building. Laptop computers, cell phones, or personal digital assistants (PDAs) are not permitted. The exam will count 50% of your final grade.

Exam accommodations. All requests for accommodations should be made to Linda McGuire, Associate Dean, College of Law.

REQUIRED READING:

Three course-paks will be available at the law school bookstore on the first floor of BLB. [Note; the bookstore has limited hours after the opening weeks of classes]:

Pak 1: Documents: decisions, briefs, statutes, manifestos and other primary sources

Pak 2: Commentary: essays, treatises, histories, and other secondary sources

Pak 3: Historians and Lawyers in Court: Lawrence v. Texas, 2003

The course-paks will be prepared on three-hole punch paper, so that you can easily keep them in binders. You should plan to bring to class the readings we will be discussing that day. From time to time we may add a document or two.

One required book: MELTON MCLAURIN, CELIA: A SLAVE

SCHEDULE

Wed Aug 27: Introduction

Introduction to course

Mon Sept 1: LABOR DAY

No Class

PART ONE: LAW AND PATRIARCHY

Wed. Sept 3: Antique Traditions in Early America

Pak #2: Gerda Lerner, *THE CREATION OF PATRIARCHY*, ch. 5

Pak #1: CODE OF HAMMURABI, *selections*
Sir William Blackstone, *COMMENTARIES ON THE LAW OF ENGLAND, 1771-1778 selections*
According to the condition of the mother, Virginia statute, 17th century.
Fulton v. Shaw (Va. 1827)

Mon. Sept 8: Sexuality in Early America

Pak #2: John D'Emilio and Estelle Freedman, *A HISTORY OF SEXUALITY*, chs. 1 & 2
Mary Beth Norton, *Thomas/Thomasina, in FOUNDED MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF THE AMERICAN SOCIETY* (1996).

Pak #1: Tapping Reeve, *THE LAW OF BARON AND FEMME, selections*

Wed. Sept 10: The Culture of Coverture

Mon Sept 15:

Pak #1: Cases on coverture (Pak #1)
Prescott v. Brown (Maine 1843)
Lanier v. Ross (N.C. 1834)
Bradley v. State (Miss. 1824)
State v. Rhodes (N.C. 1868)

Conner v. Shepherd (Mass.1818)

Allen v. McCoy (Ohio 1838)

Comparison between English and Civil Law systems:

Pak #2: Deborah Rosen, *Women and Property Across Colonial America: Comparison of Legal Systems in New Mexico and New York*, 60 WILLIAM AND MARY QUARTERLY, 355-381, 3d series (2003)

Bea Ann Smith, *The Partnership Theory of Marriage*, 68 TEX. L. REV. 689 (1990) *selections*

Pak #1: Van Maren v. Johnson (Calif 1860)

Wed. Sept 17: Living with Slavery

Melton McLaurin, CELIA: A SLAVE (1991)

Pak #2: Adrienne Davis, "The Private Law of Sex and Race: An Antebellum Perspective," 51 STANFORD L. REV. 221 (1999) *selections*

Pak #1: Stephens v. Clements (Penn. 1814)

Mon. Sept 22: Destabilizing Coverture

Pak #1: Documents: Married Women's Property Acts:
Mississippi statute (1839)
New York statutes (1848, 1861)
Iowa statutes (1846, 1866)
Declaration of Sentiments (1848)

Pak #2: Commentary: Gerda Lerner, *The Meanings of Seneca Falls, 1848-1998*, DISSENT, Fall, 1998, *abridged*
Reva Siegel, *Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) *selections*

Pak #1: Brooks v. Schwerin (N.Y. 1873)
H. Apple Co. v. Ganong (Miss. 1872)
McElfresh v. Kirkendall (Iowa 1873)

PART TWO: RENEGOTIATING CITIZENSHIP 1865-1962

Wed. Sept 24: Race, Gender and Citizenship after the Civil War

Mon. Sept 29:

- Pak #1: Documents: 13th, 14th, 15th Amendments
 Cogder v. North West Union Packet Co. (Iowa 1873)
 Bradwell v. Illinois [1873]
 Minor v. Happersett [1875]
 Plessy v. Ferguson [1896]
- Pak #2: Ellen Carol DuBois, *Taking the Law into Our Own Hands: Bradwell, Minor, and Suffrage Militance in the 1870s*, in *VISIBLE WOMEN, NEW ESSAYS ON AMERICAN ACTIVISM* (1993)

Wed. Oct 1: Sex and Marriage

Wed. Oct 8:

- Pak #1: Scott v. Georgia (Ga 1869)
 In re Hobbs (N.D. Ga 1871)
 Reynolds v. US (1878)
 Comstock law (1873) and People v. Friede (N.Y. 1929)
 Muller v. Oregon (1908) and Brandeis Brief for Muller v. Oregon *selections*
 Mackenzie v. Hare (1915)
 Loving v. Virginia (1967)
- Pak #2: Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J. OF L. AND THE HUMANITIES* 251 (1999) *selections*
 George Chauncey, *GAY NEW YORK, selections*
 Nancy Cott, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION*, ch. 3 (2000)

Mon. Oct 13: Suffrage Struggle

- Pak #1: Coggeshall v. City of Des Moines (1908)
 19th Amendment
- Pak #2: Eleanor McConnell, *Fighting City Hall: The Battle for*

Municipal Suffrage in Progressive Era Des Moines,
unpublished paper, 2001

Reva Siegel, *She, the People*, 115 HARV. L. REV. 947
(2002) *selections*

Selections from documentary film, *One Woman, One Vote*,
will be shown in class

Wed Oct 15: The Limits of Suffrage, the Persistence of Coverture

Pak #1: U.S. v. Schwimmer (1929) [military service and
citizenship]
Breedlove v. Suttles (1937) [poll tax]
Goesaert v. Cleary (1948) [employment]
Hoyt v. Florida (1961) [jury service]
United States v. Yazell (1966) [Texas coverture]

Pak #2: Alice Kessler-Harris, *THE PURSUIT OF EQUITY*, ch. 3.

PART THREE: NEW HARMS, NEW MEANINGS: REINTERPRETING THE CONSTITUTION

Mon. Oct 20: Law and Grassroots Social Movements

Wed. Oct 22:

Pak #2: Pauli Murray & Mary O. Eastwood, *Jane Crow and the
Law*, 34 GEO. WASH. L. REV 232 (1965)
Cynthia Harrison, *ON ACCOUNT OF SEX*, *selection*
Brenda Feigen, *NOT ONE OF THE BOYS* (2000) *selections*
DEAR SISTERS: DISPATCHES FROM THE WOMEN'S
LIBERATION MOVEMENT (Rosalyn Baxandall and Linda
Gordon eds., 2001)
SDS Women, *To the Women of the Left*, 1967
Redstockings, *Manifesto*
Radicalesbian, *The Woman Identified Woman*, 1970
Doris Wright, *Angry Notes from a Black Feminist*, 1970
American Footbinding
Bread and Roses, *Declaration of Women's
Independence*, 1970
Lee Schwing, *Editorial on Separatism*, 1973
Patricia A. Cain, *Tales from the Gender Garden:
Transsexuals and Anti-Discrimination Law*, 75 DENVER
UNIV. L. REV. 1321 (1998) *selections*

- Pak #1: Title VII, Civil Rights Act of 1964
 Title IX, 1972 Education Amendments
 Phillips v. Martin Marietta (1969): opinion and amicus brief
 Faith Seidenberg v. McSorley's Old Ale House (1969)
 Ulane v. Eastern Airlines, Inc. (7th Cir. 1984)

Mon Oct 27: What's Fair? What's Equal?

Wed Oct 29:

Mon Nov 3: Part One

- Pak #1: Reed v. Reed (1971)
 Frontiero v Richardson (1973)
 Craig v. Boren (1976)
 Geduldig v. Aiello (1974)
 Equal Rights Amendment
- Pak #2: Linda K. Kerber, *Sally Reed Demands Equal Treatment*, in DAYS OF DESTINY (James McPherson & Allan Brinkley eds., 2002)
 David E. Kyvig, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, (1996), *selection from ch. 17*

Part Two

- Pak #2: Mary Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold*, 75 IOWA L. REV. 915 (1990)
 James Mohr, *Iowa's Abortion Battles of the Late 1960s and Early 1970s*, 50 ANNALS OF IOWA 63 (1989)
 Sarah Weddington, A QUESTION OF CHOICE *selections*
 Joyce Murdoch & Deb Price, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT, *selections*
- Pak #1: Griswold v. Connecticut (1965)
 Roe v. Wade (1973)
 Planned Parenthood v. Casey (1992)
 Doe v. Commonwealth's Attorney (1975) affirmed, 1976

Wed. Nov 5: Guest Lecture: Modern Harms

Mon. Nov 10: PAPER PRESENTATIONS

Wed. Nov 12: PAPER PRESENTATIONS

Mon. Nov 17: PAPER PRESENTATIONS

Wed. Nov 19: PAPER PRESENTATIONS

T h a n k s g i v i n g B r e a k

Mon. Dec 1: [conferences on revising papers]

Wed. Dec 3: Historians in the Courts:

Pak #3: Lawrence v. Texas opinions
Lawrence v. Texas Brief of Professors of History, other
briefs
Sylvia Law et al., THE PUBLIC HISTORIAN (1989) Forum
on whether historians should write briefs

